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No. 00-1934

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AMERICAN GENERAL FINANCE, INC., MERIT LIFE INSURANCE CO., and YOSEMITE INSURANCE COMPANY,

Petitioners

v.

MABLE BRANCH,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statements were set forth at page ii of their Petition for a Writ of Certiorari, and there are no amendments to those Statements.

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ARGUMENT IN REPLY

Respondent has engaged in all sorts of strained legal and logical gymnastics in an attempt to convince this Court that the questions presented for review by this case do not warrant consideration by the Court. Respondent's own Brief in Opposition, however, demonstrates that the questions presented are far from settled and that a decision by this Court resolving these issues is necessary.

I. Respondent Has Completely Misread This Court's Decision In *First Options of Chicago, Inc. v. Kaplan*.

Respondent's entire argument on the first question presented is totally undermined by her blatant misreading of this Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). Contrary to respondent's erroneous assertion, the issue before the Court was emphatically not "whether a court or an arbitrator should decide this dispute over the *scope* of the arbitration agreement." (Brief in Opp. 13) (emphasis added). This Court's opinion in *First Options* is clear that the Kaplans denied that "they agreed to arbitrate" at all. 514 U.S. at 942. The Court characterized this disagreement over the question whether a valid and enforceable arbitration agreement existed between the parties as one "about the *arbitrability* of the dispute." *Id.* (emphasis in original). Respondent is simply wrong in stating that the issue before the Court was whether a particular claim or dispute fell within "the scope of a presumptively valid arbitration clause." (Brief in Opp. 13).

The Court in *First Options* then considered the question whether the trial court or the arbitrator should decide "the arbitrability of the dispute" between the parties — whether a valid and enforceable arbitration agreement existed between them. 514 U.S. at 942. The Court held that the "parties may

agree to arbitrate arbitrability" when "there is clear and unmistakable evidence that they did so." 514 U.S. at 943-44. This is so, the Court explained, because the question whether the "parties agree[d] to submit the arbitrability question itself to arbitration," like other issues involving arbitration, "is simply a matter of contract between the parties" that depends upon whether "the parties objectively revealed an intent to submit the arbitrability issue to arbitration" in their agreement. *Id.* The parties clearly did so here. (*See* Pet. App. 3a). Indeed, the parties' agreement to "arbitrate all issues of arbitrability" is "inclusive, categorical, unconditional and unlimited." *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1199-1200 (2d Cir. 1996).

II. There Is Substantial Conflict And Confusion Among The Federal And State Courts That Have Addressed The *First Options* Issue Presented By This Case.

Respondent asserts that no court has held that "parties must go to arbitration to find out whether or not they entered into a valid and enforceable arbitration agreement in the first place." (Brief in Opp. 15 n.4). Respondent is mistaken. *See In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 n.3 (Tex. 1999) (holding that "whether the terms and conditions of an arbitration agreement are themselves unconscionable is a matter which must be submitted to the designated arbitrator"); *see also Berkley v. H & R Block Eastern Tax Serv., Inc.*, 30 S.W.3d 341, 344 (Tenn. App. 2000) (relying on *First Options* and holding that the parties agreed "to arbitrate the question of the validity and enforceability of the arbitration clause itself"), *review denied*, Nov. 6, 2000, *cert. denied*, 121 S. Ct. 1602 (2001). *Contra Prevot v. Phillips Petroleum Co.*, 133 F. Supp. 2d 937, 939-40 (S.D. Tex. 2001) (holding that the issue of unconscionability of an arbitration

clause is always a question for the court). Which view is correct? Only this Court can provide a definitive answer.[1]

Relying on this Court's decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), respondent asserts that a court must always decide whether arbitration is proper. Respondent's reliance is misplaced because this Court expressly held in *Prima Paint* that the arbitrator, *not the court*, should decide the validity of the contract as a whole, which would necessarily include a determination by the *arbitrator* of the validity of the arbitration provision as a consequence. 388 U.S. at 404. Respondent's strained interpretation of *Prima Paint*, which did not involve a *First Options* clause, is also inconsistent with the "central purpose" of the FAA, which is "to ensure 'that private agreements to arbitrate are enforced according to their terms.' " *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995), *quoting Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).[2]

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1. Respondent has also completely ignored the fact that the parties expressly incorporated into their arbitration agreement the Commercial Rules of the American Arbitration Association. (Pet. App. 3a). Rule 8 of the Commercial Rules grants the arbitrator the power to rule on, among other things, the "*validity* of the arbitration agreement." (R. 399) (emphasis added). In *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989), the First Circuit held that the "parties contracted to submit issues of arbitrability to the arbitrator," including the "validity of the agreement to arbitrate" itself, when "the parties agreed that all disputes arising out of or in connection with their contract would be settled 'in accordance with the rules of arbitration of the International Chamber of Commerce.' " 886 F.2d at 472-73. The decision below is in direct conflict with the First Circuit's decision in *Apollo Computer, supra.*

2. While respondent emphasizes that her "unconscionability argument goes to the making and original validity of the asserted arbitration agreement" (Brief in Opp. 14), the "making" and

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In sum, respondent, like Justice Lyons in his special concurrence on rehearing in the court below, argues that this case is controlled by this Court's decision in *Prima Paint*, *supra*, rather than *First Options*, *supra*. Five days after the petition was filed in this case, the Seventh Circuit, in an opinion by Judge Easterbrook, grappled with the interplay and proper application of *Prima Paint* and *First Options*. *See Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587, 590-92 (7th Cir. 2001) (rejecting an argument based on *Prima Paint* that "sits uneasily alongside *AT & T Technologies* and *First Options*" because it "disregard[ed] the principle that arbitration is contractual"). This tension between *Prima Paint* and *First Options* provides a solid reason for granting review in this case, for only this Court can clarify whether *Prima Paint* can be read to hold that the issue of unconscionability of an arbitration provision is always a question for the court even when a *First Options* clause is present.

III. Respondent Has Failed To Address The Argument That The Determinative Factor In The Decision By The Court Below To Invalidate The Parties' Arbitration Agreement Was The Prevalence Of Arbitration Agreements In The Marketplace.

Petitioners and respondent agree that the question whether respondent had any "meaningful choice" was, in the Alabama Supreme Court's view, outcome determinative. (*See* Pet. 18 n.7; Brief in Opp. 16). As respondent states, the court below in the *April Reaves* case enforced the identical arbitration agreement (with all its alleged defects) "against

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"validity" of the arbitration agreement with respect to the Kaplans was also the issue in *First Options*, *supra*. 514 U.S. at 941-42. *See generally Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. at 478-79 (parties are generally free to structure their arbitration agreements as they see fit without violating § 4 of the Act).

another borrower who was shown to have greater choice as to arbitration at the time of her loans." (Brief in Opp. 16). Indeed, the other indicia of unconscionability discussed by the court applied equally to the *Reaves* case decided on the same day as *Branch*. But eight (8) of the nine (9) members of the court rejected the defense of unconscionability in *Reaves*. (Pet. App. 28a-29a). Respondent's own brief, therefore, refutes her position that the decision below on the unconscionability issue is fact-specific or fact-intensive, for the decision below turned solely on the "prevalence" of arbitration agreements in the marketplace.

Recognizing the fundamental flaw in her position, respondent has not even addressed petitioners' argument that the Alabama Supreme Court's views on the widespread use of arbitration agreements run headlong into Congress' objectives in enacting the FAA in the first place. Section 2 of the FAA " 'is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.' " *Perry v. Thomas*, 482 U.S. 483, 489 (1987), *quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). In enacting the FAA, Congress "had the needs of consumers, as well as others, in mind." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995). *See generally* S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924) (the Act, by avoiding "the delay and expense of litigation," will appeal "to big business and little business alike, . . . corporate interests [and] individuals"). As discussed in the petition, arbitration agreements have since flourished nationwide as a preferred method of resolving disputes. (Pet. 19-21).

The inescapable conclusion that the court below invalidated the parties' arbitration agreement precisely because other companies, without any input from petitioners, have accepted Congress' open invitation to use arbitration provisions in their contracts is clear from a comparison of

the court's holding in *Branch* and its holding in *Reaves*. The Alabama Supreme Court's use of the "prevalence" of arbitration agreements in the marketplace as the "primary indicium" of unconscionability (Pet. App. 25a), moreover, is in direct conflict with the FAA's liberal federal policy favoring arbitration agreements. As a result, the state law is preempted by the FAA and cannot stand. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996); *Perry v. Thomas*, 482 U.S. at 491-92; *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). *See generally* U.S. Const. art. VI, cl. 2. Respondent, however, has dodged this argument entirely.

Respondent has also failed to rebut our argument that the Alabama Supreme Court's new unconscionability test did not "ar[i]se to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. at 492 n.9. Prior to its decision in this case, the court below had held that when a provision in a contract has become so "widely used and accepted in a particular trade," there is "a prima facie case that the usage is reasonable." *Fleming Farms v. Dixie Ag Supply, Inc.*, 631 So. 2d 922, 926 (Ala. 1994); *Southland Farms, Inc. v. Ciba-Geigy Corp.*, 575 So. 2d 1077, 1080 (Ala. 1991). In this case, on the other hand, the court applied the opposite presumption, declaring that the parties' arbitration agreement is unconscionable precisely because it was "widely used and accepted in a particular trade." (Pet. App. 26a-27a). The court's new test is preempted by the FAA because it "singl[es] out arbitration provisions for suspect status" in violation of Congress' mandate that the courts must place arbitration agreements " 'upon the same footing as other contracts.' " *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 687, *quoting Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974).[3]

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3. The court's decision in *Lloyd v. Service Corp. of Alabama, Inc.*, 453 So. 2d 735 (Ala. 1984), does not alter this conclusion. (Cont'd)

IV. Respondent's Own Brief In Opposition Demonstrates That The Court Below Singled Out The Parties' Arbitration Agreement For Suspect Status In Violation Of The FAA Based On Lack Of Mutuality Of Remedy.

Under *general* principles of contract law in Alabama, mutuality of remedy is *not* a requirement for a valid and enforceable contract. *See, e.g., Marcrum v. Embry*, 291 Ala. 400, 403, 282 So. 2d 49, 51 (1973). *See generally Restatement (Second) of Contracts* § 363, Comment c (1981) ("the law does not require that the parties have similar remedies in case of breach"). The court held directly the opposite in this case. (Pet. App. 24-25). *Compare AT & T Tech., Inc. v. Communications Workers*, 475 U.S. 643, 650 (1986) (parties may exclude certain claims or issues from arbitration in their agreement). The court's decision is preempted by the FAA because it "places arbitration agreements in a class apart from 'any contract,' and singularly limits their validity." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. at 688, *quoting* 9 U.S.C. § 2.[4]

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In *Lloyd*, the court held that "the enforcement of 'unbargained for' exculpatory clauses in residential leases [is] against the best interests of the citizens of Alabama and contrary to public policy." 453 So. 2d at 740. The court did "not hold that exculpatory clauses in residential leases are void *per se*" because of their widespread use in the marketplace. *Id.* at 741. And, while market prevalence may have been a "relevant" factor in *Lloyd* (Brief in Opp. 17), it was outcome determinative here. In any event, a state-law test of unconscionability based on widespread use of arbitration agreements must give way to the liberal federal policy favoring arbitration agreements embodied in the FAA as a matter of *federal* law. *See Perry v. Thomas*, 481 U.S. at 493; *Southland Corp. v. Keating*, 465 U.S. at 16-17.

4. Respondent correctly points out that the Arkansas, California and West Virginia state courts have held that lack of mutuality of

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It is clear from the face of respondent's brief that her arguments, like the decision by the court below, constitute "generalized attacks on arbitration" that " 'rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.' " *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991), *quoting Rodriquez de Quijas v. Shearson/American*

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remedy in an arbitration agreement governed by the FAA renders the provision either unconscionable or otherwise unenforceable. *See Showmethemoney Check Cashers, Inc. v. Williams*, 342 Ark. 112, 121, 27 S.W.3d 361, 367 (2000); *Armendariz v. Foundation Health Pyschcare Servs., Inc.*, 24 Cal. 4th 83, 118-19, 6 P.3d 669, 692-93 (2000); *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854, 862 (W. Va. 199[illegible] On the other hand, the Second, Third, Fourth and Sixth Circuits, as well as the courts of at least three states, have held that lack of mutuality of remedy in an arbitration agreement governed by the Act does not render the provision unconscionable or unenforceable. *See Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 711 (4th Cir. 2001); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180-83 (3d Cir. 1999); *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 451-53 (2d Cir. 1995); *Wilson Elec. Contractors, Inc. v. Minnottee Contracting Corp.*, 878 F.2d 167, 169 (6th Cir. 1989); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542, 542 S.E.2d 360, 365 (2001); *Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 137-39, 535 N.E.2d 643, 646-47 (1989); *Willis Flooring, Inc. v. Howard S. Lease Constr. Co.*, 656 P.2d 1184, 1185-86 (Alas. 1983). This is yet another issue regarding the proper application of the FAA that is far from settled.

Furthermore, the refusal of the court below to sever the alleged invalid cap on punitive damages in the parties' arbitration agreement pursuant to the agreement's severability clause (R. 96) is in conflict with the Eighth Circuit's decision in *Gannon v. Circuit City Stores, Inc.*, __ F.3d __, No. 00-3243, 2001 WL 930550 (8th Cir. Aug. 17, 2001). Only one of the cases cited by respondent involved an arbitration provision containing a cap on punitive damages and none of the provisions in the cases cited by respondent contained a severability clause. (*See* Brief in Opp. 20-21 n.7).

Express, Inc., 490 U.S. 477, 481 (1989). As such, respondent's arguments and the decision below are " 'far out of step with [this Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes.' " *Gilmer, supra, quoting, Rodriquez de Quijas, supra. See generally Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) ("there is no reason to assume at the outset that arbitrators will not follow the law").

We have shown that this case raises important and recurring questions of federal law under the FAA and that there is substantial conflict and confusion among the federal and state courts that have addressed these issues. The Court should issue the writ because litigants, the federal and state trial courts, and the federal and state appellate courts, in the absence of a decision by this Court, will have to waste additional valuable time and resources briefing, debating and deciding the substantial questions presented herein.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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